



July 2, 2001

Mr. William R. Pemberton
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OR2001-2842

Dear Mr. Pemberton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148500.

The City of Crockett (the "city"), which you represent, received a request to examine all ballots prior to early voting for the May 5, 2001 general election including "mail-in ballots and applications, all schedules for ballot distribution, all ballot boxes, all locks, keys and seals, all election supplies, and all receipts for ballot printing and election supplies." The requestor then asks to "to re-examine all of the aforementioned materials, any newly purchased materials and receipts for such purchases, any unused ballots (regular and mail-in) and any spoiled ballots (regular and mail-in)" after the election. You claim that some of the requested information is not "public information" and other information is excepted from disclosure under section 552.101 of the Government Code. We have considered your arguments and the submitted information.

You contend that the ballot boxes, locks, keys, seals, and election supplies are not "public information" under the Public Information Act (the "Act"). Section 552.002 of the Government Code provides that "public information" means information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business by a governmental body. However, tangible physical items are not the type of information contemplated under the Act. *See* Open Records Decision No. 581 (1990) (tangible items not public information). We agree that the requested ballot boxes, locks, keys, seals, and election supplies are tangible items, and are not "public information" subject to the Act. Therefore, these tangible items need not be produced in response to this request.

We understand you to assert that the remaining requested information is excepted under section 552.101 of the Government Code and various sections of the Election Code. Notwithstanding the tangible items, the requestor has requested access to all ballots, including mail-in and applications, prior to and after the election, as well as unused and spoiled ballots. The requestor also asked for schedules for ballot distribution and receipts

for ballot printing and election supplies. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by statute. Section 1.012 of the Election Code deals with public inspection of election records and provides as follows:

(a) Subject to Subsection (b), an election record that is public information shall be made available to the public during the regular business hours of the record's custodian.

(b) For the purpose of safeguarding the election records or economizing the custodian's time, the custodian may adopt reasonable rules limiting public access.

(c) Except as otherwise provided by this code or Chapter 552, Government Code, all election records are public information.

Elec. Code § 1.012(a)-(c).

With regard to the submitted receipts for printing and election supplies, you have not provided, nor have we found, a provision in the Election Code or other law which provides that receipts for election supplies are confidential. Further, section 552.022(a) provides in pertinent part:

Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Therefore, we conclude that you must release the receipts under section 552.022(a)(3) of the Government Code.

Next, we address the request for applications. A copy of an application for a ballot to be voted by mail may be obtained from the early voting clerk 72 hours after the time a ballot is mailed to the voter or 48 hours after the time a ballot is mailed to the voter if the mailing occurs on the fourth day before election day. *See* Elec. Code § 86.014(a). Further, the original application for a ballot to be voted by mail is available for public inspection after it is delivered to the general custodian of election records after the election. Elec. Code § 86.014(b). Thus, the Election Code provides for public access to the applications. Accordingly, you must allow the requestor to examine the applications.

As to the request for schedules for ballot distribution, section 51.007 of the Election Code provides as follows:

- (a) As soon as practicable after the ballots are packaged for distribution, the authority responsible for distributing election supplies shall prepare a record of the number of ballots and the range of serial numbers on the ballots to be distributed to each presiding judge and the early voting clerk.
- (b) The authority shall preserve the record for the period for preserving the precinct election records.

Elec. Code § 51.007. After reviewing the Election Code, we have not found any Election Code provisions or other law that suggests that the schedules for ballot distribution are confidential by law. Therefore, you must allow the requestor to examine the schedules for ballot distribution.

Next, we address the public availability of ballots prior to the election. In an election ordered by a city authority, the city secretary shall procure election supplies, including ballots, for each precinct polling place and early voting polling place. *See* Elec. Code §§ 51.001(defining election supplies); 51.003 (providing for procurement and allocation of election supplies). Pursuant to section 51.006 of the Election Code, the city secretary shall package and *seal* each set of ballots before their distribution. The presiding judge must take precautions to prevent access to the ballots from the time the presiding judge receives the official ballots until the precinct returns have been certified. *See* Elec. Code § 61.005(a).

Further, section 52.007 provides for the creation of a “specimen ballot.” Section 52.007 provides in pertinent part:

- (a) An official ballot for each ballot format used in each election shall be designated a specimen ballot.
- (b) The specimen ballot shall be made available for public inspection:
 - (1) for an election other than a primary election, in the office of the authority responsible for having the official ballot prepared[.]

...

- (c) The specimen ballot shall be made available for public inspection as soon as practicable after the official ballots have been prepared for the election and shall be preserved for the period for preserving the precinct election records.

...

(f) A specimen ballot may not be reproduced for distribution.

Elec. Code § 52.007(a)-(c), (f). Section 52.008 also provides for the creation of a “sample ballot.” Section 52.008 provides as follows:

(a) The authority responsible for procuring the election supplies may have a supply of sample ballots printed.

...

(c) Sample ballots shall be distributed for use in the election as directed by the authority responsible for procuring the election supplies.

(d) A sample ballot may not be cast or counted in an election.

Elec. Code § 52.008(a), (c)-(d). Based on the foregoing statutes, we conclude that the public does not have access to ballots prior to the election. As provided in section 51.006 of the Election Code, the city secretary is required to *seal* the ballots before distribution. Further, if the public could have access to the ballots, there would be no need to provide for public access to the “specimen” and “sample” ballot. Therefore, we conclude that, prior to the election, ballots are confidential by law and, therefore, the requestor may not examine the ballots prior to the election.

As for the request to examine the ballots after the election, chapter 66 of the Election Code pertains to the conduct of elections and provides for the distribution of “precinct election records” after the election. “Precinct election records” is defined as precinct election returns, voted ballots, and other records of an election that are assembled and distributed under chapter 66 of the Election Code. *See* Elec. Code § 66.002. Voted ballots are placed in ballot box No. 3, and spoiled and unused ballots are placed in ballot box No. 4 and delivered to the general custodian of election records. *See* Elec. Code §§ 66.025, .026, .051.¹

Section 66.058(a) of the Election Code requires, with exceptions which do not appear to be applicable here, that precinct election records be preserved by the authority to whom they are distributed for 60 days after election day. Subsection (b) of section 66.058 requires that *voted ballots* and *ballot stubs* be preserved in a locked room in the locked ballot box or sealed envelope in which they are delivered to the general custodian of election records and that, “[e]xcept as permitted by this code, a ballot box containing voted ballots or an envelope containing ballot stubs may not be opened during the preservation period.” *See also* Elec. Code §§ 213.007 (access to voted ballots for recounts), 221.008 (access to voted ballots for

¹The city secretary is the general custodian of election records for an election ordered by a city authority. *See* Elec. Code § 66.001(2).

election contest), 1.013 (election records may be destroyed after preservation period unless election contest or criminal investigation or proceeding in connection with election is pending). The preservation period in the instant case is sixty days after the May 5, 2001 election. *See* Elec. Code § 66.058(a). Therefore, we conclude that the requested voted ballots are not subject to disclosure under the Act until the preservation period has run. *See* Open Records Decision No. 505 at 4 (1988) (a request made during the preservation period to inspect voted ballots must be treated as a request to inspect the ballots when the retention period expires).

We note, however, that the spoiled and unused ballots are not required to be kept in a locked box as are voted ballots, but are only required to be preserved for 60 days after the election and then may be destroyed. *See* Elec. Code § 1.013 (providing that election records may be destroyed after the prescribed period time). Information in ballot box no. 4, which contains the spoiled and unused ballots, may be preserved in that box or by any other method chosen by the custodian. *See* Elec. Code § 66.058(f). The general custodian of election records or the custodian's designee shall be present at all times when the records delivered in ballot box no. 4 are inspected. *See* Elec. Code § 66.057(b). Because section 66.058(b) of the Election Code specifically provides that voted ballots and ballot stubs must be maintained in a lock box but does not provide the same protection for spoiled and unused ballots, we conclude that the spoiled and unused ballots are not confidential by law. As you have raised no other exceptions to disclosure, you must allow the requestor to examine the spoiled and unused ballots.

In conclusion, we find that the ballot boxes, locks, keys, seals, and election supplies are not public information under the Act. We have also determined that, prior to the election, the ballots are not public information and the requestor may not examine the ballots prior to the election. We note, however, that the Election Code provides for public access to "specimen" and "sample" ballots. Further, the voted ballots are not subject to disclosure under the Act until the sixty day preservation period expires. As you have raised no other exceptions to the disclosure of the spoiled and unused ballots, ballot distribution list, and applications, the city must allow the requestor to examine this information. The city must also release the receipts under section 552.022(a)(3) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

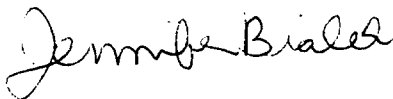
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer H. Bialek
Assistant Attorney General
Open Records Division

JHB/sdk

Ref: ID# 148500

Enc: Submitted documents

c: Mr. Harrison Hurst
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(w/o enclosures)